UF | UNIVERSITY of FLORIDA

Levin College of Law
Danaya C. Wright

311 Holland Hall
PO Box 117625
Gainesville, FL 32611-7625
352-273-0946
352-392-3005 Fax

225260

June 15, 2009

Surface Transportation Board
Attn: STB Ex Parte No. 690
395 E. Street, SW
Washington, D.C. 20423-0001

ex parte 690

Re: Notice of Intent to Participate

Pursuant to STB Notice of May 21, 2009, I would like an opportunity to speak before the Board on its July 8th public hearing regarding: Twenty-Five Years of Railbanking, A Review and Look Ahead.

I request no more than 10 minutes of the Board's time to discuss the legal issues facing rail banking and the answers to the qustions posed by the Board. I am also submitting written testimony that is significantly longer than my oral testimony via the comments section of the E-filing website. I will confine my oral testimony to answering question 6 posed by the Board and elaborating on the additional issues I believe the Board should consider in its review of the Rail Banking program.

Thank you for this opportunity to speak before the Board.

Danaya C. Wright
Clarence J. TeSelle Professor of Law
University of Florida, Levin College of Law
P.O. Box 117625
Gainesville, FL 32611
352-273-0946
352-392-3005 (fax)
wrightdc@law.ufl.edu

Testimony of Professor Danaya C. Wright
University of Florida, Levin College of Law
before the Surface Transportation Board
July 8, 2009

I. Introduction

As you no doubt know, the railroads developed in different ways in different parts of the country. Most of the rail lines on the eastern seaboard and the midwest were acquired by state-chartered railroads using the power of eminent domain to either negotiate and purchase corridor land or to condemn it. From the 1830s until the 1880s, most people desired better railroad access and encouraged state legislatures and local governments to do whatever it took to bring a new rail line to their towns and cities.[1] In response, states, counties, and municipalities all donated lands for corridors, depots, and other rail facilities. Many issued bonds to help support the fledgling railroads and some legislatures authorized state investments directly in railroad corporations. Railroads were often exempted from property taxes for years, and sometimes in perpetuity, and often they were allowed banking and lottery privileges. When terms and conditions in charters requiring roads be constructed by a certain time proved difficult to meet, virtually every state amended the charters to give the railroads more time or to permit the state treasury to invest in the companies in order to facilitate construction. Many states attempted to build their own railroads, going significantly into debt (up to $90 million in the 15 years preceding the Civil War), but then ultimately sold the roads at greatly reduced costs to private companies.[2]

In many areas of the south and west, the railroads were given rights-of-way over federal lands for construction of their roads, and between 1862 and 1871 the transcontinental railroads were chartered by the federal government and received over 150 million acres of public land to sell to raise funds to construct the great Pacific roads.[3] In exchange, all the railroads that were federally chartered were required to provide reduced fares for government freight, the post, and military troops. The rights-of-way also were to be available for telegraph or other communications purposes. Federal involvement in the transcontinental railroads was extensive and railroad lobbyists were fixtures in the halls of Congress.

After 1875, concern with corruption in railroad management, stock scandals like the Credit Mobilier scandal in 1872, pooling, and extreme dissatisfaction with discriminatory fares and schedules, led many states to create regulatory agencies to oversee railroad operations and protect shippers. These began in the midwestern Granger states but soon expanded eastward and southward as railroads were building at unprecedented rates.[4] The decade of the 1880s saw more railroad miles built than in any other period in our history; 71,000 miles of track were added, nearly doubling the mileage that had been built in the previous five decades.[5] As dissatisfaction grew

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[1] See generally John Stover, *American Railroads*, 2d ed., 1997; George Rogers Taylor, *The Transportation Revolution*: 1815-1860, 1951; Paul W. Gates, *The History of Public Land Law Development*, 1968; James W. Ely, Jr., *Railroads and American Law*, 2001

[2] For a lengthy discussion of state and local subsidies to early American railroads, see Taylor, 86-96.

[3] *See* Gates at 362-368.

[4] *See* Stover at 119-122.

[5] Stover at 134.

despite state regulations, pressure mounted for a uniform federal regulatory policy. In 1887, the Interstate Commerce Commission was created to regulate maximum prices and other aspects of rail services, though most scholars agree that the regulations did little to curb many of the most flagrant abuses.[6]

When the railroads proved unable to perform satisfactorily at the beginning of World War I, Congress authorized the nationalization of the country's railroads and the appointment of a railroad commissioner to manage wartime freight and passenger transportation. In 1920, with the end of the war and the imminent return of the nation's railroads to their private ownership, Congress passed a comprehensive Transportation Act that increased the ICC's regulatory jurisdiction over rates, services, and labor, as well as abandonments of duplicative and unprofitable lines. From the 1880s until 1920, there had been significant consolidation of rail lines as smaller companies were bought up by larger and larger roads. Overbuilt lines were shed quickly throughout the 1920s and 1930s as the railroads worked to become more efficient and responsive to public needs and regulatory demands. Their efforts were largely successful as their better management and greater efficiency held off a further round of nationalization during World War II.

But with the end of the second World War came tremendous public investment in air travel, pipelines, and highways which ultimately forced some of the biggest rail carriers into bankruptcy. The 1970 Penn Central bankruptcy was a wake up call to Congress and the shipping public that America's rail system was severely broken. Despite the creation of Amtrak to pick up most of the nation's passenger rail service and the creation of Conrail to take over the freight service of the northeast covered by the Pennsylvania, New York Central, and the Erie Lackawanna Roads, Amtrak has yet to turn a profit, and it was over a decade before Conrail became profitable enough to return to private ownership. The 1970s and 1980s witnessed a second surge of abandonments as the nation's rail carriers sought to consolidate and streamline into nimble competitive transportation options.

In 1983, concerned with the high rates of abandonments throughout the late 1970s, Congress passed amendments to the National Trails System Act to permit railroads to "rail bank" their corridors through a process overseen by the ICC.[7] This process enabled the railroads to shed ownership and liability for underused lines by transferring them to trail sponsors who would put the land to use for interim recreational trails and telecommunications facilities. During the interim trail use, state law property rights would remain intact and the rail corridor would not be destroyed. The railroads then retained a right to reactivate the lines if future needs dictated. The federal law was upheld by the Supreme Court in 1990 in *Preseault v. I.C.C.*,[8] though the Court remanded the case to the Court of Claims for a determination of whether the application of the rail banking law worked a taking of adjacent property owner's rights for which compensation would be due.

In 1995, the Surface Transportation Board was created to take over the regulatory duties and powers of the ICC. Throughout the twentieth century, the ICC played a major role in the operation, consolidations, and abandonments of the nation's railroads. Since 1983, over 4600 miles of rail corridors have been rail banked and preserved under the watchful eye of the ICC and/or the STB. At the same time, over

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[6] Stover at 123-128, Ely at 93-96.
[7] 16 U.S.C. §1247(d).
[8] 494 U.S. 1 (1990)

4000 miles of trails have been developed to the great enjoyment of the public at large.[9] This does not include the additional 11,000 miles of trail developed on non-railbanked corridors.[10]

In the past few years, however, nine railroads have sought to reactivate all or a portion of their previously rail banked corridors and the STB, the railroads, and the trail sponsors have had to deal with numerous emerging and unexpected issues that had not been adequately provided for in Trails Act agreements and contractual negotiations. Also, beginning in the early 1990s, adjacent landowners have brought numerous compensation claims for the taking of their private property, which have resulted in a handful of compensation orders. Despite threats to popular trails from reactivation and the political stigma of takings challenges, public support for the program is at an all-time high.

With the Obama administration's commitment to investing significantly in the nation's railroads, it is only logical that the details regarding reactivation under the rail banking program should be analyzed. Because I believe this program is vitally important to the preservation of valuable public assets I have asked to speak before the Board at this hearing. I have provided this lengthy and perhaps unnecessary summary of the history of this country's railroads in order to emphasize what I believe is the most important issue in the legal debates that have surrounded the rail banking provisions of the Trails Act: the oft-neglected public's rights in these rail corridors.

There can be no question that the nation's railroads were constructed with significant public assistance, including land donations, monetary investments, eminent domain powers, tax reductions, favorable legislation, and even outright legal monopolies. Without the public support for these common carriers, there would have been no railroads, certainly not in the time frame and to the scale they were built. Without free rights-of-way over federal lands, the railroads could not have built the transcontinental roads. And without the grants in aid they could not have been built as quickly as they were.[11] Moreover, since 1887 there has been a recognized public oversight of the nation's railroads, often to the chagrin of the railroads themselves. That regulatory oversight was justified as a protection of the public's rights in the nation's common carriers.

Despite this recognized public interest, too many late-twentieth-century legal disputes and judicial precedents treat railroad property matters as private disputes between private corporations and private citizens. When adjacent landowners challenge ownership or use of rail corridor lands, courts routinely decide the cases based on the common law of private land ownership. This failure to recognize the public's rights in these corridor lands has resulted in decades of negative precedents that have done far more to harm the nation's railroad infrastructure and hamper the positive effects of the rail banking program than any legislative or regulatory acts since 1887. The railroads have acquiesced in portraying these land disputes as purely private matters, and adjacent landowners have had no incentive to interject public rights into their disputes. If my testimony does nothing more than to urge this Board to consider better protecting the

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[9] In 2006 the Rails-to-Trails Conservancy reported that 256 rail corridors had been railbanked covering 4628 miles, 2451 miles of trails had already been developed and an additional 1683 were under development. *See* http://www.railstotrails.org/resources/documents/resource_docs/Railbankingreport_7-06_lr pdf

[10] *See* http://www.railstotrails.org/whatwedo/railtrailinfo/trailstats.html.

[11] Although there is debate as to whether the grants in aid were worth the cost to the federal treasury, there is certainly consensus that without the grants the railroads would not have been built as quickly as they were and the western territories would not have been settled as quickly. See, e.g , Lloyd Mercer, *Railroads and Land Grant Policy: A Study in Intervention,* 1982.

public property rights at stake, then I will be satisfied. In my mind, the railroads are trustees of these valuable national assets and this Board, Congress, and the federal courts have an obligation to hold the railroads to their corresponding duties regarding these lands.

II. Qualifications

I am currently a Professor of Law and an Affiliate Professor of History at the University of Florida, Levin College of Law. I hold an A.B. and J.D. from Cornell University and a Ph.D. in political science from Johns Hopkins University.

I have written and lectured extensively on the topic of state and federal property law applicable to the ownership of railroad rights-of-way. My publications include:

- "The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: *Hash v. U.S.* and the Threat to Rail-Trail Conversions," 38 *Environmental Law* 711-76 (2008).
- "Charitable Deductions For Rail-Trail Conversions: Reconciling The Partial Interest Rule and the National Trails System Act," (co-authored with Scott Bowman), 32 William & Mary Envt'l Law and Policy Review 1-57, (2008)
- "Rails-to-Trails: Conversion of Railroad Corridors to Recreational Trails," in Michael Allan Wolf (ed), 78A *Powell on Real Property* (2007);
- "A New Time For Denominators: Toward A Dynamic Theory Of Property In Regulatory Takings' Relevant Parcel Analysis," 34 *Environmental Law* 175-245, (2004), reprinted in *2005 Planning and Zoning Law Handbook*, (Thomson/West);
- "Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's Fifth Amendment Jurisprudence?" 26 *Columbia Journal of Environmental Law*, 399-481,(Spring 2001);
- "The 'Anti-*Boomer* Effect:' Property Rights, Regulatory Takings, and a Welfare Model of Land Ownership" 6 *Australia Journal of Legal History* 1-28 (Summer, 2000);
- "Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements from the Nineteenth to the Twenty-First Centuries," (co-authored with Jeffrey M. Hester), 27 *Ecology Law Quarterly* (May, 2000);
- "Trains, Trails and Property Law: Indiana Law and the Rails-to-Trails Controversy," 31 *Indiana Law Review* 753-780 (1998);
- "Private Rights and Public Ways: Property Disputes and Rails-to-Trails in Indiana," 30 *Indiana Law Review* 723-761(1997).

I have been invited to give lectures on railroad title issues at conferences held by the International Right-of-Way Association, Rails-to-Trail Conservancy, and numerous law schools. I was invited to give testimony before the U.S. House Judiciary Committee's Subcommittee on Administrative Law regarding the railbanking statute in June, 2002. I have served as a consultant with the United States Department of Justice in a number of the claims seeking compensation from the United States based on the railbanking legislation. I have also served as a consultant and expert witness for the Internal Revenue Service in cases involving tax deductions by railroads for donations of land under the railbanking program. I

have served as an expert witness for a number of railroads, including the Penn Central, the Union Pacific, and smaller regional lines like Camas Prairie RailNet. I have also consulted with Sprint Telecommunications regarding fiber optic lines on railroad corridors. Among legal academics, I am recognized as the foremost scholar on railbanking and rails-to-trails conversions and a leading scholar on the history of railroad property rights. I wrote the chapter on rail-trail conversions in the multi-volume pre-eminent treatise *Powell on Real Property* (see above). I have spent the past thirteen years of my professional life studying the legal consequences of railbanking and railroad property title claims.

III. Responses to Questions Posed

1. Has rail banking under Section 8(d) been a success for rail carriers and trail users?

Undoubtedly the answer to this question is yes. The nine rail banked lines that have been or are being restored to rail service are proof that preserving corridors intact for future reactivation is not a sham (as the plaintiffs claimed in the case of *Preseault v. I.C.C.*[12] The hundreds of miles of rail banked corridors that have been converted to trails, and the millions of users of those trails who have benefited from safe recreational and transportation corridors prove the success of the rail banking program. As Justice Brennan explained, "Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable. Given the long tradition of congressional regulation of railroad abandonments, . . .that is a judgment that Congress is entitled to make.[13] Ultimately, rail banking is an eminently sensible way to achieve both goals: rail preservation and trail use.

Could the program have been more successful? Undoubtedly yes. More railroads could have opted to rail bank their corridors by working more assiduously with trail sponsors. They could have reaped greater tax savings by donating these lands, and they would have had better opportunities to restore rail service had they entered into rail banking agreements rather than permanently disposing of their corridor lands. State parks and highway departments could have done more to facilitate rail banking by choosing to rail bank all corridors that were abandoned within their states, thus dramatically increasing trail opportunities for citizens and helping to preserve these corridors for future reactivation. And the STB could and should have interpreted the statute as authorizing mandatory railbanking, so that the disposition of these corridors, representing such a significant public investment, is not decided by the whim or purely parochial interests of private railroads.

Could the railroads and trail groups have avoided significant legal liabilities had they rail banked more? Again, the answer is yes. Where trails have gone in on rail corridors that were not rail banked, there have been significant legal costs. The Monon Trail in Indiana took many years and hundreds of thousands of dollars in legal fees to litigate the title issues that could have been avoided had the railroad banked its corridor. The B&O trail in Indiana was in legal limbo for a decade as a result of a lawsuit filed by adjacent landowners. More miles of trails have been created from non-railbanked corridors than from rail-banked ones, and many have been the subject of lawsuits that could have been avoided had the federal jurisdiction not been lifted. Retaining federal

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[12], 494 U.S. 1, 17 (1990)

[13] *Preseault v. I.C.C.* 494 U.S. 1, 19 (1990)

jurisdiction, by rail banking a corridor, essentially pre-empts all state-law property disputes and avoids most legal actions in state courts.

Thus, while rail banking has been a success in that it has achieved its dual goals of preserving rail corridors for future reactivation and allowing interim trail use, it could have been used more frequently by all parties concerned. Railroads have sometimes felt that the negotiations weren't worth the bother, but have since come to appreciate the benefits of rail banking much more than they did in the 1980s and early 1990s. And while trail groups often pop up quickly when the prospect of a new trail arises, they have had difficulty raising the money within the requisite time periods to purchase and construct their trails when they have not had state or federal assistance. This has slowed the rate of obtaining CITUs and NITUs. State assistance in particular would have dramatically increased the success of the rail banking program. States like Michigan and Wisconsin, that have over 1500 trail miles each, have been supportive, while states like Delaware and Nevada, with fewer than 10 trail miles each, have taken a hands off approach that has allowed many valuable corridors to be irrevocably lost.[14]

2. Have most rail corridors proposed for rail banking under Section 8(d) actually been developed into trails?

According to a 2006 report published by the Rails-to-Trails Conservancy, 4600 miles of corridor had been railbanked to that date, and over 4000 miles of trails had been developed or were in the process of being developed on those miles. This is roughly 87%, which seems rather good in light of the difficulties and delays in obtaining financing to construct these trails.

3. Should the Board require notice or a copy of the Trails Act Agreements to be submitted to the Board?

For what purpose? If the purpose is to insure that a trails act agreement was actually entered into, then I would think certification by the railroad or the trail sponsor would be sufficient.

If the purpose is to guarantee that certain contract terms are covered in the agreement, because the Board wants to protect all parties and insure that certain future issues are covered, then I would think it would make more sense to simply promulgate regulations requiring the presence of certain contract terms. I do not think the Board needs to or wants to review all agreements to insure that they appropriately cover all pertinent factors.

If the Board is concerned that rail banking is somehow being used fraudulently, and that the parties have no intention of constructing trails, it is unlikely that notification will deter the behavior. Moreover, to the extent some corridors are banked without an interim trail, this would likely occur on corridors that would not have successfully attracted a trail anyway. In that sense, the more important issue is not whether interim trails are actually being constructed so long as the primary goal of corridor preservation is still being served during the rail banking period.

Perhaps what should concern us are land speculators who obtain NITUs or CITUs only to stall the abandonment and land sale process long enough to locate better buyers or more favorable terms. Then, the NITU or CITU is lifted and the land is finally fully abandoned. But again, hasn't the NITU or CITU simply postponed a process that

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[14] See http://www.railstotrails.org/whatwedo/railtrailinfo/trailstats.html

would have occurred anyway? No trails are being lost and no corridors are not being preserved that would have been saved but for the supposedly fraudulent process. In other words, when the alternative is destruction and loss of corridors, even temporary rail banking is positive, especially when the NITU or CITU gives everyone a little breathing room to locate a trail sponsor or pull together financing to use the corridor for interim trails.

Hence, other than the contract terms mentioned above, I see little reason for the STB to monitor the trails act agreements. However, I do think the STB could be more watchful if NITUs or CITUs are being lifted and the corridor fully abandoned with little effort at attracting a trail sponsor or preserving the corridor for future rail service.

4. What can or should the Board do to further facilitate rail banking and encourage the restoration of active rail service on rail banked lines?

The Board should take the position that rail banking is the expected norm and that any deviation from that norm requires unusual circumstances. I.e., railbanking should be mandatory, not voluntary, where there is a willing trail manager, and the STB should be prepared to step in to set the terms of the conveyance, as it does in the contract of OFAs, if no agreement can be reached. Even if an immediate trail sponsor is not coming to the fore, many corridors have multiple public uses as utility corridors, recreational trails, and linear parks and greenways to facilitate wildlife migration. These assets should not be lost. As I noted above, there was a tremendous amount of public assistance that went into the construction of these corridors and I think it is incumbent on lawmakers and courts to recognize and protect the public investment in these lands. In my mind, these are quasi-public lands that were devoted to a common carrier purpose, and which can continue to serve important public ends. Rail restoration may be just one of a number of important public uses to which this land can be put.

In many respects, however, the horses are already out of the barn. Most of the corridors that were good prospects for rail banking have already been abandoned and lost. As the rate of abandonment slows, the need for more regulations may wane as well. Yet we have learned much over the past 25 years about many of the issues that face trail sponsors (slow rate of obtaining financing to develop trails, legal challenges, liability questions, environmental issues, recalcitrant state governments) and railroads (limits to their tax deduction levels for donating corridor lands, state legislative limits on the ability to purchase abandoned rail corridors, and their own fiscal needs) that frustrate rail banking negotiations. A more streamlined process with STB assistance in overcoming some of these hurdles would help. For instance, STB regulations that require contracts include certain standard terms would likely simplify the negotiation process. The STB and the IRS could work together on setting rules for tax deductions for donated corridors that would avoid some of the partial interest exclusions that currently apply. Federal legislation like TEA-21 that requires expenditures on transportation enhancements help, but they could be better integrated into STB procedures that could require state DOT participation in the abandonment process. Proactive federal agencies that are committed to corridor preservation could institute new regulations or encourage Congress to pass legislation that will facilitate rail banking.

5. Who should bear the cost to restore a rail corridor for rail service, including replacing any bridges that may have been removed during interim trail use?

The railroads, had they continued to operate trains over their corridors, would have had significant maintenance costs on most of these corridors. By rail banking they

have avoided decades of costs for track and bridge upgrades. They have received tax deductions for donations of some of these lands. They have also avoided environmental clean-up costs, property taxes, and legal fees for challenges by adjacent landowners. And while we cannot know for certain the exact amount of these costs, many of them can be estimated with reasonable accuracy. I would assume the railroads are rational economic actors and that they took actions to rail bank their corridors with an understanding of these cost savings. It would seem only reasonable, therefore, to impose the cost of restoring the line to a level appropriate for active rail service on the entity that reaped the benefits of rail banking and will benefit from the new infrastructure – the railroads. Even if the railroad had not rail banked its corridor, but merely left it idle for a period of some years, the costs to rehabilitate the line for active use would fall on the railroad, which of course is the entity that will reap the financial rewards of the reactivation. There is certainly no logical reason to impose the cost on trail sponsors or the public when their investments of millions of dollars in building a trail could be destroyed by a reactivation.

6. How have reversionary property owners been affected by rail banking?

Adjacent landowners have been quick to complain that they are the losers in this entire process. Land that may have been taken from their farms or their backyards to comprise the rail corridor, they argue, should be returned to them upon the discontinuation of rail services. That was the expectation of the parties when the roads were constructed and the law should support the return of this land to the adjacent parcels, and we should not impose an additional public burden on these servient lands. This narrative, however, dramatically misrepresents the true facts.

First, when most of these corridors were constructed, the understanding of the parties was that a fee simple interest was being conveyed to the railroads. This is because lesser interests were simply inadequate for the railroad's needs. In the vast majority of instances, the railroads paid significantly more than the fair market value for a fee interest in the land being acquired. They also paid for damage to the remaining adjacent parcels caused by construction and operation of rail service that might bisect farms, injure livestock, take timber, destroy crops, and change drainage patterns. Even where the railroad did not pay significant consideration for this land, the negotiations were at arms-length as farmers and merchants desperately sought railroad access. The railroads brought significant wealth to landowners nearby, reducing their transportation costs and increasing their land values, and for this reason nearly everyone wanted a nearby railroad.[15]

Second, over the next century and a half, ownership of the adjacent parcels changed hands many times, sometimes resulting in the subdivision of the adjacent parcel. More likely than not, the market value of that land was much higher as a result of rail access. When those subsequent sales occurred, virtually every deed of the adjacent land to a successive buyer excluded the rail corridor from that conveyance. Descriptions of the land went to the outer edges of the rail corridors and even when a parcel encompassed a rail corridor on both sides, the rail corridor would be carefully excepted from the deed transaction. Certainly, subsequent purchasers of adjacent land knew there was a rail corridor abutting their land and also knew that they were not acquiring any legal interest in that rail corridor.

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[15] Taylor, *The Transportation Revolution*, 87-88 Though many landowners may have disagreed about the costs the railroad should pay for condemning their land, most wanted the benefits the railroads brought.

Third, many rail corridors have already been converted to highways, or share highway rights-of-way, because it was generally understood that these corridors are essentially public thoroughfares. Since 1920, federally-granted rights-of-way could be converted to a public highway within a year of railroad abandonment and the adjacent landowners had no role in that process. Ironically, some adjacent landowners have claimed title in rail corridors when the railroad and the landowner both acquired their land from a local municipality. The assumption that adjacent landowners have rights in all rail corridors fails to recognize the public origins of much of the railroad land.

Fourth, when landowners have acquired rights in abandoned rail corridors as a result of state laws or legal presumptions that the railroads acquired only easements and upon discontinuation of rail service the easements terminate, these have been windfalls. They did not pay more for adjacent land on the expectation that someday the railroad might cease to run and they could absorb that land. They have never paid property taxes on railroad corridors that would give them an equitable claim to that land through prescription. Case law is very clear that adjacent landowners cannot adversely possess rail corridor land, especially if doing so would jeopardize present or future rail service. Thus, where early twentieth-century changes in case law have generated precedents that adjacent landowners have some legal rights in these quasi-public corridors, they have done so at the expense of well-established legal rights of railroads and the public.

Fifth, adjacent landowners have denied any public rights or interests in these rail corridors, despite the fact that public eminent domain powers were used to acquire them (as with highways and canals) and that public needs continue to require that these multi-use corridors be put to public purposes. Adjacent landowners either want the land for free or to be paid when other public uses are made of it. This is simply unreasonable given the history of how these corridors were assembled, the payments that were made to their predecessors for this land, and the public dollars that were invested in creating these roads. Furthermore, the possibility of future rail reactivation for railbanked corridors makes it even more unreasonable to imagine that adjacent landowners should be compensated. They purchased land adjacent to an active rail corridor with no expectation that rail service would cease and they really cannot complain if rail service is reactivated. In the meantime, they had the benefit of a less intensive use that very likely increased their property values and improved their quality of life.

IV. Additional Issues the Board Should Consider

1. Legal Challenges

There have been a number of different types of legal challenges to rail banking and interim trail use. One type has been the state-wide class actions against the railroads for their sales of abandoned lands, whether that land would be used for trails or not. These claims allege that adjacent landowners should not have to purchase abutting corridor land, but should simply absorb it for free. They also allege that if the railroads sell their corridor lands to anyone else, they are slandering the adjacent landowners' titles. These cases have been expensive and time-consuming, but are on the wane. They are filed in state courts and are simple quiet title suits that are inappropriately being brought as class actions principally to benefit a small cadre of lawyers. To the extent states have adjudicated these cases differently, some ruling in favor of railroad title and shifting public use doctrines while others have ruled in favor of adjacent landowners, the states have set up a patchwork of contradictory rules that have deeper implications. Except for a handful of midwestern states, most have concluded that adjacent landowners do not have automatic rights to abandoned rail corridors and they have recognized the importance of allowing shifts to other public uses. A number of states

have correctly required adjacent landowners to prove their own title to corridor land before they are allowed to challenge the claims of the railroads. This is a standard truism of property law that all to frequently has been cast aside in these railroad title cases.

A second set of legal challenges comprise the takings claims seeking compensation from the United States as a result of the rail banking statute. If railroads dispose of property without rail banking, the legal challenges are of the type listed above. If they rail bank first, then adjacent landowners have claimed that the federal statute "takes" their property rights without compensation. The Supreme Court upheld the rail banking statute in 1990 in *Preseault v. I.C.C.*, but remanded on the issue of whether it might work a taking in certain circumstances. The rule that has developed is that takings liability might attach in states where the state courts have ruled that the adjacent landowners had stronger rights in abutting corridors, while no takings liability will attach in states that more strongly protect the railroad's property rights or that allow for shifting public uses. Thus, the state law patchwork has resulted in takings liability in some states but not others when corridors have been railbanked. In general, however, there should be no liability merely for rail banking a corridor and preserving it for future reactivation, as preservation is a valid continuing railroad use under state law. It is only the interim trail use which is deemed, in some instances, to be an additional burden on land encumbered by a railroad easement that triggers takings liability.

To date, the federal takings liability has been relatively small compared to the number of miles of rail banked corridors, in part because some states have recognized the importance of public rights and shifting public uses in their state laws. These laws interpret railroad easements broadly to include a variety of public transportation and utility uses. A greater concern to all, however, should be the financial motivations of the same small cadre of plaintiffs' attorneys who have been bringing these suits. Class action suits are generally inappropriate vehicles for settling property title issues, as each piece of property is unique. Judge Richard Posner of the 7th Circuit warned against lawyers who use these class actions to line their own pockets with little concern for the interests of their clients.[16] These cases appear to be valid sources of Judge Posner's critique.

A third set of legal challenges involve rail banked corridors that were originally acquired as federally-granted rights-of-way (FGROW). In 2005, the court of appeals for the federal circuit, in *Hash v. U.S.*,[17] held that the federal government did not retain reversionary interests in FGROWs, despite nearly a century of legislation dealing with the disposal of these lands upon abandonment. As a result, takings liability was deemed to attach. That case was followed by lower courts, despite significant concerns with the logic and the ruling. The federal circuit partially corrected itself in April, 2009, however, when it ruled that the *Hash* decision did not resolve important issues of the scope of the FGROW or the abandonment process necessary to trigger adjacent landowner rights.[18] Although this issue is proceeding through the federal courts, it's not the rail banking that is the concern, but rather the possible nullification of federal property rights and federal statutes.

A fourth set of legal challenges, that have primarily been settled, have to do with utility uses on abandoned rail corridors, both rail banked and non-rail banked. During

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[16] See *Mars Steel v. Continental Ill. Nat'l Bank & Trust*, 834 F.2d 677, 678 (7th Cir 1987) ("Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients, have all the initiative and are close to being the real parties in interest.")

[17] 403 F.3d 1308 (Fed. Cir. 2005)

[18] See *Ellamae Phillips Co. v. U.S* , 564 F.3d 1367 (Fed. Cir 2009).

the 1990s, the telecommunications industry was avidly wiring the country with fiber optic cables and using railroad corridors that may or may not have been legally available options. Those suits have pretty much settled, in part because much of the technology has moved to satellite services rather than fiber optics, but also because the telecommunications providers felt it was cheaper to settle than litigate the complex property rights underlying the railroad corridors. Nevertheless, issues still remain for other types of utility or third-party uses of rail corridors. The Attorney General's office took the position that the federal government could authorize fiber optic cables on FGROW lands, but with the *Hash* decision, that issue has not been revisited.

A fifth set of legal challenges involves charitable deductions for donations of rail banked corridors. Because those cases involve complex tax issues, I won't discuss them here. As a general matter, however, they appear to be close to resolution as well.

In sum, despite what many felt to be a spate of legal challenges surrounding the rail banking program, the legal issues are being resolved. We should not forget, however, that no federal program goes unchallenged and unlitigated. Every step of railroad construction faced extensive legal challenges and we are not experiencing anything new. We can take comfort, however, in the fact that after 25 years of experience with rail banking, the legal issues are mostly resolved and the rights of the public are beginning to gain greater protection.

2. The Rights of the Public in Railroad Corridor Property

As I have repeatedly noted above, the most important issue the Board should consider are the public rights and interests at stake in rail banking, corridor preservation, and interim trail use The history of the industrial development of this country shows that the railroads played a vital yet sometimes destructive role. Without railroads, this country might not have been able to settle the vast Western territories. Without the railroads we could not have developed into the industrial giant we had become at the turn of the twentieth century. The railroads allowed us to exploit our natural resources, develop the land, and manufacture goods to give us the highest standard of living in the developed world.

But the railroads have certainly not always been fiduciary trustees of the public good, as railroad barons manipulated stock, defrauded investors, overcharged the public treasuries, and exploited the people's trust. In the wake of corporate scandals and fraud that eclipsed any malfeasance in the history of western civilization, the railroads are certainly not innocent actors in this history. For the most part, they have cleaned up their acts as a result of regulation and competition, as they pulled themselves back from the brink of extinction in the 50 years following World War II.

And we are now on the cusp of a new era We have finally realized that we simply cannot continue our current rate of automobile and highway construction. Times have changed and we must change with them. The railroads may or may not play a vital role in the transportation revolution of the twenty-first century. Our ability to predict the future of transportation has proven to be rather poor. Nonetheless, where the public has invested tremendous resources into the construction of vital infrastructure, logic and equity dictate that the public's interest should be put first. Although rail banking may not prove to be the best way to preserve rail corridors, it has so far been better than any other method we have adopted. And although we may not need to reactivate these corridors for rail purposes in the near future, we cannot know what our transportation needs will be another 150 years from now. The legal disputes that have plagued the first decades of this program are nothing in the grand scheme of nearly 200 years of transportation history. I believe the legal questions are slowly being resolved, and that

the courts have almost uniformly protected the public interests where they have been raised. We need to move forward to better preserve these rail corridors with a stronger focus on the public property rights. A strong regulatory and public policy stance from the STB is one of the best ways to help resolve the legal challenges that remain.

Thank you for your time and attention.

Respectfully submitted,

Danaya C. Wright
Clarence J. TeSelle Professor of Law
University of Florida, Levin College of Law

UF | UNIVERSITY of FLORIDA

Levin College of Law
Danaya C. Wright

311 Holland Hall
PO Box 117625
Gainesville, FL 32611-7625
352-273-0946
352-392-3005 Fax

June 15, 2009

Surface Transportation Board
Attn: STB Ex Parte No. 690
395 E. Street, SW
Washington, D.C. 20423-0001

Re: Notice of Intent to Participate

Pursuant to STB Notice of May 21, 2009, I would like an opportunity to speak before the Board on its July 8th public hearing regarding: Twenty-Five Years of Railbanking, A Review and Look Ahead.

I request no more than 10 minutes of the Board's time to discuss the legal issues facing rail banking and the answers to the qustions posed by the Board. I am also submitting written testimony that is significantly longer than my oral testimony via the comments section of the E-filing website. I will confine my oral testimony to answering question 6 posed by the Board and elaborating on the additional issues I believe the Board should consider in its review of the Rail Banking program.

Thank you for this opportunity to speak before the Board.

Danaya C. Wright
Clarence J. TeSelle Professor of Law
University of Florida, Levin College of Law
P.O. Box 117625
Gainesville, FL 32611
352-273-0946
352-392-3005 (fax)
wrightdc@law.ufl.edu